Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46

COMMENTS OF
THE ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
CONSUMER FEDERATION OF AMERICA,
CONSUMER PROJECT ON TECHNOLOGY,
CENTER FOR MEDIA EDUCATION, AND
PEOPLE FOR THE AMERICAN WAY

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EXECUTIVE SUMMARY

The Alliance for Community Media, Alliance for Communications Democracy, Consumer Federation of America, Consumer Project on Technology, Center for Media Education, and People for the American Way ("the Coalition") firmly believe that the development of truly open multi-programmer platforms will benefit consumers and bring a greater diversity of voices to the video programming marketplace, while still promoting Congress's goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice.

The Telecommunications Act of 1996, with its promotion of competition in the video delivery marketplace, gives the Commission the ability to ensure that mechanisms like public, educational and governmental access requirements imposed on calbe operators are updated for the emerging media environment. The Act also affords the Commission the tools to correct the problems of the past--like exorbitant rates for leased-access in cable--that have effectively kept non-profit and unaffiliated programmers off cable. The Coalition believes that this opportunity must not be missed and that the regulatory framework for open video systems must ensure that the commercial marketplace is not allowed to operate to silence the diverse non-profit programming that is critical to many communities in this country.

In enacting the new Part V of Title VI of the Communication Act of 1934 (section 302 of the Telecommunications Act of 1996 (the "1996 Act")), and in repealing the telephone-cable cross-ownership rule and permitting telephone companies the option of entering the video programming market through a number of regulatory paths, Congress has stated an intention to foster more inter-system competition. In enacting Section 653, establishing a new regulatory framework for "open video systems" ("OVS"), Congress created an attractive alternative for spurring telephone company entry into the video programming market. OVS also has the potential to further public interest goals beyond simply providing head to head inter-system competition with the cable television industry.

If properly implemented, OVS can further greater diversity of programming, increased consumer choice, lower consumer rates, and increased investment in high-end infrastructure, through the vehicle of an "open" multi-programmer platform, thus creating a video programming delivery market that operates in the public interest. Using a carrot rather than a stick, Congress has offered telephone companies relief from some regulatory requirements in exchange for providing intra-system competition and proper support for and allocation of channels for schools and universities, churches, non-profits and local governments. Congress clearly intended to use this model as a means of fostering a system that would provide the public with the benefits of programming diversity which ought to flow from a platform open to unaffiliated programmers seeking to reach consumers.

Congress has offered telephone companies the "quid" of reduced regulation and has delegated to the Commission the difficult task of setting forth the "quo" of responsibilities that will fall on telephone companies to prevent improper subsidization, preserve rights of carriage for education, governmental, and other non-profit groups and preclude non-affiliated programmers from being improperly denied carriage through unfair rates and conditions.

In submitting these comments, the Coalition is aware that this proceeding presents the Commission with the difficult but critical task of steering a narrow course through two obstacles. If the Commission creates too many regulatory disincentives to offering services as an OVS operator, telephone companies can simply abandon OVS and choose to enter the television programming market as cable operators, a strategy many have chosen to pursue rather than continuing to pursue video dialtone. Alternatively, if the Commission does not provide an effective regulatory framework, OVS may simply become "cable-lite" -- a single programmer, the telephone company, will control the vast percentage of the channel capacity, while simultaneously receiving the benefit of reduced regulation.

We submit these comments in the belief that such a course can be found. To that end, we urge the Commission to adopt rules which:

-- require LEC's to offer video programming on an open video system only through a fully separated subsidiary;

-- direct LEC's to comply with strict cost allocation procedures as a prerequisite to OVS ceritification;

-- ensure that OVS platforms provide the same access and support to public, education and governmental entities as cable operators provide;

-- require that OVS operators set rates for not-for-profit programmers discounted sufficiently to attract a broad diversity of programming to the video marketplace;

-- adopt market-based regulatory mechanisms to ensure fair rates and access that are not unjustly discriminatory, and failing that, impose reasonable rate formulas based on an operators' incremental costs;

-- ensure allocation of channel capacity that is fair and reasonable and not unjustly discriminatory, through requirements of public notice of rates, terms and conditions; a minimum number of unaffiliated programmers; and a requirement that OVS operators build out their systems to meet demand;

-- provide effective dispute resolution mechanisms to resolve questions of rates and terms and conditions of carriage; and

-- prohibit cable operators from becoming OVS platform operators.

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The Alliance for Community Media,[1] Alliance for Communications Democracy,[2] Consumer Federation of America,[3] Consumer Project on Technology,[4] Center for Media Education,[5] and People for the American Way,[6] members of the Coalition, have actively participated

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[1]The Alliance for Community Media is a national membership organization comprised of more than thirteen hundred organizations and individuals involved in public, educational and governmental ("PEG") access around the country. As such, the Alliance represents the interests of religious, community, educational, charitable, and other non-commercial, non-profit institutions who utilize PEG access centers and facilities to speak to their memberships and their larger communities and participate in an ever-growing "electronic town hall." For a fuller description of the Alliance for Community Media, see Appendix A.

[2]The Alliance for Communications Democracy is a membership organization comprised of nonprofit access corporations in communities around the country. Either alone or through its members, the organization has helped thousands of individuals use the access channels that have been established in their communities.

[3]Consumer Federation of America is the nation's largest consumer advocacy group, composed of over two hundred and forty state and local affiliates, representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

[4]The Consumer Project on Technology was created by Ralph Nader in 1995 to investigate a number of consumer issues which are related to the development of new technologies, including information technologies.

[5]The Center for Media Education ("CME")is a non-profit public interest group which works to increase the diversity of telecommunications providers. CME represents the interests of non-commercial organizations in media policy decision-making, especially as related to new distribution technologies.

[6]People for the American Way is a constitutional liberties organization with over 300,000 active members dedicated to protecting the First Amendment rights of all Americans, including

in the Commission's past proceedings in video dialtone ("VDT")[7] and submit the following comments in response to the Report and Order and Notice of Proposed Rulemaking, FCC 96-99, in the above-captioned proceeding, released March 11, 1996 ("NPRM" or "Notice"), in which the Commission seeks comment on how it should implement the requirements of the "open video system" ("OVS") framework.[8]

I. Local Exchange Carriers Should Be Required to Offer Video Programming Through a Fully Separate Subsidiary and Comply with Strict Cost Allocation Procedures as a Prerequisite for Certification.

At para. 70 of the Notice the Commission asks whether local exchange carriers ("LECs"), as a prerequisite to certification under sec. 653(a)(1), should be required to establish procedures for allocating costs between regulated telecommunications services and the unregulated provision of video programming over an open video system ("OVS").

LECs have enormous incentives to cross-subsidize their entry into the video programming market. Without effective prohibitions, cross-subsidization will result in artificially

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the right to access to a multiplicity of information sources and free expression in all media.

[7]While a number of RBOCs have announced a strategy of entering the video programming market as cable programmers, we would note that at least one RBOC has not abandoned its strategy of providing video programming through a video dialtone platform. Bell Atlantic has continued its deployment of its VDT system in Dover, Delaware and announced its intention to actively pursue other non-cable, open video system options.

[8]Communications Act 1934, 47 U.S.C. (651-653)(1996).

inflated rates for consumers of regulated telecommunications services. Therefore, the Coalition submits that the Commission must implement all regulations necessary to advance Congress' goal of fair competition, and prevent anti-competitive rate manipulation. Specifically, the Commission should not only strictly apply the cost allocation procedures of Part 64 as a prerequisite to certification, but also require that LECs provide video programming through a fully separate subsidiary.

A. The Likelihood of Cross-subsidization by LECs Is Substantial and its Harms Well-documented.

The Telecommunications Act of 1996[9] holds out the promise of effective competition in the local loop. But for the foreseeable future, a dominant LEC will remain the monopoly provider of local exchange service in its region and will generate substantial monopoly profits from its local exchange services. LECs will have an enormous incentive to channel those revenues into the provision of video programming,[10] since doing so shifts the costs of entry into the unregulated video programming market onto

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[9]Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 et seq. (1996).

[10]"The BOCs have enjoyed an increase in cash flow of more than $7 billion, yet they have increased capital expenditure by [less] than $2 billion." Consumer Federation of America ("CFA"), Basic Service Rates and Financial Cross-Subsidy of Unregulated Baby Bell Activities; The Importance of Effective Competition For Local Service Before Deregulation of Profits and Cross-Ownership 9-12 (1995).

consumers of telephone services,[11] so that the true cost of the unregulated service need not be covered in its price.[12] The result will almost certainly be that some telephone customers will subsidize video programming services to which they may not even subscribe.[13]

The documented history of cross-subsidization by local exchange carriers demonstrates the likelihood of abuses when LECs provide video services. For example, in 1990, a regulated subsidiary of NYNEX was found to have been overcharged $18 million by an unregulated NYNEX subsidiary for equipment, supplies and services; the inflated costs were recouped through the rate making process.[14] Other anti-competitive abuses by the local exchange monopolies are well-documented.[15]

B. **Congress intended that the FCC would act to protect consumers against the harms of cross-subsidization.**

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[11]"...internal generation of cash from the telephone companies enables the RHCs to finance their entry into other businesses without going to capital markets." Id.

[12]See CFA and National Association of State Utility Consumer Advocates, Providing Universal Service and Protecting Consumer Rights in the Information Age 5 (1994).

[13]*Id.*

[14]See New York Telephone Co.; New England Telephone Co., Order to Show Cause and Notice of Apparent Liability for Forfeitures, 5 FCC Rcd 866 (1990).

[15]Leslie Cauley, "Calls Waiting Rivals Are Hung Up on Baby Bells Control Over Local Markets," Wall St. J., Oct. 24, 1995, at A1.

The legislative history of the Act clearly indicates that Congress wanted to protect consumers against these harms. Indeed, Congress recognized the likelihood that cross-subsidization would frustrate its ultimate goal of vigorous and "open" competition in the provision of video programming services, and acknowledged the need for effective, pro-competitive regulatory safeguards. Both the House and Senate bills had provisions addressing these issues,[16] but the language was in conflict. The conference committe resolved these conflicts by deferring to the Commission's experienced judgment in determining what mechanism would best protect consumers. The Act clearly vests authority in the Commission to regulate the operation of OVS and to deny certification to LECs which do not comply with those regulations.[17] Congress expected that the Commission would impose safeguards to ensure that an OVS entrant would not engage in anti-competitive practices or cost-shifting. The only effective way to do so is to require a separate subsidiary.

C. The Commission has imposed a separate subsidiary requirement in similar circumstances.

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[16]H. Rep. No. 204, 104th Cong., 1st Sess. 32, 103 (1995); S. Rep. No. 23, 104th Cong., 1st Sess. 117 (1996).

[17]1996 Act, §653(a)(1). The Commission has the authority to promulgate all regulations for certification that are necessary to advance Congress' goal of fair competition and including and beyond the Part 64 rules.

The Commission has recognized the danger of cross-subsidization in other contexts where the harm to consumers and the damage to notions of full and fair competition was similar to the dangers present here. Under the 1996 Act Act, Regional Bell Operating Companies ("RBOCs") have been authorized to provide out-of-region interstate and interexchange services[18] and RBOCs which provide such services face regulation as dominant or non-dominant carriers. Though not specifically required by the Act, the Commission advocates a separate affiliate requirement for BOCs which seek regulation as non-dominant carriers, in order to prevent cost shifting and anti-competitive conduct.[19] The substantial likelihood of LECs engaging in like conduct when establishing open video platforms requires that the Commission impose a rule that before entering the video market as OVS operators, LECs establish a fully separate subsidiary for the provision of video programming and certify their compliance with the cost allocation procedures of Part 64. Although LECs, nominally, will be "new" market entrants, they have a large subscriber base and great financial strength, and will still occupy their place as the dominant telecommunications services provider in their regions. Requiring safeguards prior to

[18]1996 Act, §271(b)(2).

[19]Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, FCC 96-59, Notice of Proposed Rulemaking, released February 14, 1996.

certification will help ensure a "level playing field" among providers of video programming.

Therefore, we urge the Commission to implement this effective and efficient regulatory approach. In a climate of streamlined government, adopting a pre-certification, separate-subsidiary requirement will prospectively relieve the Commission of much of the burden of adjudicating individual cost and rate manipulation complaints.

D. A Separate Subsidiary Requirement Will Also Further the Goals of Ensuring Reasonable Rates and Non-discriminatory Access.

As explained in section III infra, the most effective means of policing the statutory requirements continued in section 653(b)(1)(A) that the rates, terms, and conditions of carriage are just and reasonable and not unjustly or unreasonably discriminatory are to require an arms-length contract between the OVSPO and its affiliated programmer, the public filing of such contract and the opportunity for unaffiliated programmers to access the OVS with the same rates, terms and conditions as the affiliated programmer. The requirement of a fully separate subsidiary is necessary to implement this important requirement of the statute.

II. Implementation of Public, Educational, and Governmental Access on Open Video Systems must Allow Meaningful Platform Access for Schools, Churches, Universities, Charities, Local Institutions and Individuals.

A. The Telecommunications Act of 1996 Requires That PEG Access on OVS Provide the Same Level of Services and Support to the Nation's Communities as PEG Access on Cable Systems.

When Congress passed the 1996 Act, it specifically required that section 611 of the 1984 Cable Act (47 U.S.C. § 531) be applied to open video system platform operators ("OVSPOs"). Section 611 permits franchise authorities to ask for and receive PEG access capacity, equipment, facilities and services from cable operators. The new law therefore requires OVSPOs to provide similar capacity, equipment, facilities and services to PEG access operations in a like manner.

The Act states that "the Commission shall, to the extent possible, impose obligations that are no greater or lesser than the obligations" contained, inter alia, in the PEG access provisions of section 611.[20] The Coalition urges the Commission to provide for equivalent obligations on OVSPOs and cable operators in order to encourage the further growth of PEG access.

B. Wherever Cable PEG Access Exists, OVS Interconnection with Existing Cable PEG Access Centers Should Be Required.

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[20] 1996 Act § 302 (new 47 U.S.C. § 653(c)). See also NPRM at ¶ 52-53. The Conference Report's explanatory language is equally unambiguous: "new section 652(c)(2)(A) requires that the Commission shall, to the extent possible, impose obligations that are no greater or lesser than the [PEG access] obligations contained in the provisions described in new section 653(c)(1)(B)." Both House and Senate Commerce Committee reports on legislation that was to become the 1996 Act stress the importance of PEG access capacity on video dialtone ("VDT") platforms, the regulatory precursor to OVS.

To effectuate the purposes of the 1996 Act, the Coalition recommends that the Commission adopt the following principles.

In jurisdictions where there are already-existing cable PEG-access entities, OVSPOs should duplicate the cable operator's activities, according to the exact terms of each locality's franchise agreement. The OVSPO should be required to interconnect with the existing PEG channels, and provide financial support, services, equipment and facilities equal to services provided by the incumbent cable operator. The OVSPO should be obligated to perform all activities and provide all such facilities as are required by the franchise agreement that may be necessary to effectuate such carriage. These activities should include, at minimum, carrying signals from the PEG access centers or cable operator's headend to the OVSPO's, and providing any translation and/or interconnection equipment necessary to adapt from the cable operator's format to the OVSPO's. We urge the Commission to prohibit OVSPOs from imposing costs on entities managing PEG access centers by hiding them in "incidental" but vital services, such as menu listings, conversion services and carriage to the headend.

If the OVSPO is unwilling to comply with the terms of the franchise agreement's PEG provisions as written, the franchise authority, the cable operator and the OVSPO should be permitted to negotiate an arrangement to share PEG access responsibilities.

If the cable operator, the OVSPO and the franchise authority are unable to reach an accord on the joint provision of PEG access facilities, equipment and services, then either (a) the OVSPO should be required to either create its own PEG services according to the terms of the franchise agreement or a negotiated package equivalent to the cable operator's franchise obligations; or (b) an independent auditor chosen jointly by the franchise authority and the OVSPO should be used to determine a cash equivalent to the cable operator's total commitment. That cash equivalent should be paid by the OVSPO to support PEG access.

The OVSPO should be required either to attach the outstanding franchise agreement, or a separate agreement between the OVSPO and the franchise authority, signed by both parties, with the OVSPO's certification application.

In a case where an OVS provider interconnets with a cable operator that maintains its own internal PEG access operations, the cable operator should be required to keep separate books and create a separate corporate identity for the PEG access entity. Ideally, cable operators should be required to transfer their PEG operations to an independent non-profit organization, local school or governmental agency. Transferring these responsibilities to a separate non-profit entity will guarantee that cash and in-kind support from an OVSPO for an interconnected PEG access center will be used <u>for</u> PEG access. In any dispute between the cable operator and the OVSPO regarding any joint and several responsibilities under their PEG access provision agreement, the franchise authority may be permitted to act as an arbitrator. Any decisions of the franchise authority may be appealed to the Commission.

Upon request of the franchise authority, the Commission could order an OVSPO to show cause why it should not be decertified for failure to fulfill its obligation to the franchise authority. Anyone, including managers of PEG access centers, unaffiliated programmers, or cable subscribers, who is aggrieved by the failure of an OVSPO to fulfill the terms of PEG carriage and/or the failure of a franchise authority to enforce the terms of an agreement, should be permitted to take a complaint directly to the Commission. Upon a determination by the Commission that the OVSPO is not in compliance with the terms of the franchise agreement, the Commission may order the OVSPO decertified. An OVSPO may be decertified until the Commission has determined that the breach has been remedied. The Commission may, in conjunction with the OVSPO and the franchise authority, also appoint an independent arbitrator whose determination shall be final. The Commission should not preempt the right of a third party to apply state law remedies, if any, requiring enforcement of agreements on behalf of taxpayer third-party beneficiaries (including any injunctive relief).

C. **Where There Are No Incumbent PEG Access Requirements, OVSPOs Should Be Required, upon the Request of the Franchise Authority or the Commission, to Offer PEG Access.**

In those jurisdictions in which there may be no incumbent cable operator, the Coalition supports a rule that would require OVSPOs to allocate capacity and resources to PEG access even when there is no parallel cable operator. The Coalition would support a rule in this situation requiring the OVSPO to provide PEG according to the terms of the nearest operating cable system that does have a commitment to provide PEG access, facilities, services and equipment.

If the OVSPO has bought out an existing cable system and intends to operate it as an OVS, the analogous situation could be created. Cable systems purchased by LECs should, therefore, be required either to abide by the terms of the franchise agreement at the time the system was purchased, or with terms agreed to thereafter by the franchise authority.

Finally, if the cable operator is not required to provide PEG access, at the time it is purchased by a LEC,[21] the franchise authority should nonetheless be given the authority to request that the OVSPO voluntarily provide carriage and financial support for PEG access, or to request that the OVSPO tie into the facilities of a neighboring jurisdiction on a voluntary basis.

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[21]See Section VI, infra.

If a franchise authority declines to exercise any option it may have to request PEG access channels on the local OVS system where no PEG exists on the incumbent cable system, such waiver of right should be in writing and included as part of the OVSPO's request for certification under Section 653.

If, contrary to the Coalition's view, the Commission were to permit a cable system to convert to OVS, the existing PEG access terms should become permanent unless the franchise authority agreed to changes via the normal, local political process (i.e., local resolution or ordinance).

III. The Commission Should Issue Bright Line Rules to Guarantee Fair and Reasonable Rates and Nondiscriminatory Access.

Section 653 of the 1996 Act directs the Commission to prescribe regulations that ensure non-discriminatory access to open video systems, at rates, and under terms and conditions that are "just and reasonable, and [that] are not unjustly or unreasonably discriminatory."[22] At the same time, Congress wanted to promote the entry of local exchange carriers into the video market and therefore, expressed the intention that OVS operators not be subject to Title II-like regulation.[23] The Commission seeks comment on how to reconcile these seemingly contradictory mandates.[24]

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[22]§653(b)(1)(A).

[23]§653(c)(3).

[24]Notice, at ¶30.

The Coalition submits that there is no contradiction--that the two mandates are consistent. We believe that by lifting both the non-discrimination principle and non-discrimination language from Title II, Congress signaled the importance of the principle itself, and merely cautioned the Commission not to use its regulatory authority to impose a comprehensive common carrier regulatory framework on OVS operators. Regulation prohibiting discrimination among video programming providers is central to Congress's goal of achieving diversity of programming sources and increasing consumer choice through intra-system competition. Without this clear attention to the principle of non-discrimination, we believe that open video systems operators will have the incentive to maximize profits by keeping unaffiliated and independent programmers off their systems.

As with other potential enforcement mechanisms in this proceeding, the best means of enforcement is to require entities to make a showing before they are certified, that they have complied with the nondiscriminatory access requirements. Specifically, the Coalition urges the Commission to:

(1) not rely on the voluntary efforts of OVS operators;

(2) establish a market-based regulatory mechanism, or if the market-based mechanisms fail, set reasonable rates for programmer access;

(3) look to its experience with non-discriminatory access in the cable leased access area; and

(4) require that OVS operators establish reduced rates for not-for-profit programming.

A. The Commission Should Not Rely on the Voluntary Efforts of OVS Operators to Provide Non-discriminatory Access.

The obvious incentive for OVS operators to hoard capacity and to maximize profits, and the Commission's own experience with leased access on the cable systems indicate that relying on the voluntary efforts of OVS operators to establish just and reasonable rates will frustrate the congressional goals of diversity of programming sources and increased consumer choice.

Clearly, an OVS operator would make the greatest profit by imposing excessive rates and prohibitive terms and conditions on unaffiliated programmers: Unaffiliated programming would be kept off the system and affiliated programming could thus be made more attractive to advertisers. Moreover, the Act itself may create a perverse incentive for OVS operators to keep demand by unaffiliated programmers low so that the one-third limit on affiliated programming is not triggered.[25]

B. The Commission Should Adopt a Market-based Regulatory Mechanism for Third-party Access.

The Coalition urges the Commission to adopt a market-based regulatory mechanism, to monitor the effectiveness of that mechanism, and, if those market mechanisms fail to achieve the goals of diversity and increased consumer choice, to set rates based on the incremental cost of providing access. It is

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[25]Demand in excess of channel capacity limits the OVSPO to selecting programming services for carriage on one-third of the activated channel capacity. See §653(b)(1)(B).

important to note that the Coalition's proposal is quite different from simply relying on market incentives and competition with cable operators to ensure that rates are just and reasonable. Rather, the Coalition's proposal is a proactive mechanism that uses market factors to gauge reasonableness; it requires:

(a) full disclosure of the terms of carriage;

(b) a presumption of reasonable rates based on the amount of capacity occupied by programmers who are unaffiliated with the OVS operator;

(c) a presumption that if the rate is ten percent higher than the incremental cost of providing the service, the rate is discriminatory; and

(d) an effective dispute resolution mechanism.

1. Full disclosure of terms of carriage.

First, the Commission should require that OVS operators disclose all rates, terms and conditions for carriage by making their contracts with both affiliated and unaffiliated programmers public. Public disclosure of contract terms will help prevent discrimination and allow programmers to assess the reasonableness of proposed carriage rates and terms. Any platform contract that an OVS operator negotiates with its own affiliate could serve as a benchmark, both as to terms and conditions of carriage and reasonable rates. The OVSPO's failure to offer its affiliate's or an unaffiliated programmer's contract terms (including bundled services, promotion and advertisement, "bill and keep," and pass-through terms) to any other unaffiliated programmer would be considered presumptively discriminatory. The Coalition also endorses the idea that unaffiliated programmers have the right to insist on pro-rata terms for any quantifiable terms within the OVSPO-affiliate contract.

2. Reasonable rate benchmark based on the amount of capacity occupied by unaffiliated programmers

Second, the Coalition proposes that the presence of unaffiliated programmers on twenty-five percent of capacity (excluding non-must carry channels) would provide an appropriate reasonable rate benchmark. We believe that the Commission's alternative proposal of measuring reasonableness in terms of the number of unaffiliated programmers is less desirable when system growth is taken into consideration. However, should the Commission decide to determine reasonableness by the number of programmers on the system, the presence of at least four (again, excluding must carry channels) would provide an appropriate benchmark at the beginning of the OVSP's service.

3. Presumption based on rate comparison to incremental cost

While the OVSPO should always have the burden of showing reasonableness, as an additional safeguard, a strong presumption should be created that any access rate that is ten percent higher than the incremental cost of providing the service is unreasonable. As we discussed in section III(A) supra, an OVS